Supreme Court, U.S.
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No.

In the Supreme Court of the United States

RICKEY E. WEIR AND JANET E. WEIR,
PETITIONERS,

V.

THE CITY OF SPRINGFIELD, ILLINOIS, a municipal corporation,
RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE APPELLATE COURT OF THE STATE OF ILLINOIS,
FOURTH JUDICIAL DISTRICT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The first question presented is whether the Takings Clause of the Fifth Amendment, as made applicable to the states by the Fourteenth Amendment, precludes a municipality from charging the owner of a landlocked parcel of land a fee to use a "private road", owned by the municipality as part of its municipal street system, for ingress to and egress from the landowner's residential real estate located outside the boundaries of the municipality.

The second question presented is whether the Due Process Clause of the Fourteenth Amendment precludes a municipality from charging the owner of a landlocked parcel of land a fee to use a "private road", owned by the municipality as part of its municipal street system, for ingress to and egress from the landowner's residential real estate located outside the boundaries of the municipality.

PARTIES TO THE PROCEEDINGS

Petitioners are Rickey E. Weir and Janet E. Weir. Respondent is The City of Springfield, Illinois, a municipal corporation.

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PETITION FOR A WRIT OF CERTIORARI

RICKEY E. WEIR and JANET E. WEIR respectfully petition for a writ of certiorari to review the judgment of the Fourth District Appellate Court of Illinois in this case.

OPINIONS BELOW

The order of the Illinois Supreme Court (App., *infra*, 17a) is unreported. The order of the Illinois Appellate Court (App., *infra*, 2a-13a) is unreported. The order of the Sangamon County, Illinois, Circuit Court (App., *infra*, 14a-16a) granting petitioners' motion for summary judgment is unreported.

JURISDICTION

The order of the Illinois Appellate Court was entered on June 30, 2000. A timely filed petition for rehearing was denied on October 4, 2000. On January 29, 2001, a timely filed petition for leave to appeal to the Illinois Supreme Court was denied. On May 7, 2001, Justice Stevens extended the time within which to file a petition for a writ of certiorari to and including May 29, 2001. The jurisdiction of this Court is invoked under 28 U.S.C. 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Takings Clause of the Fifth Amendment to the United States Constitution provides that "nor shall private property be taken for public use, without just compensation". The Fourteenth Amendment to the United States Constitution provides in relevant part that "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT

Respondent, The City of Springfield, Illinois, a municipal corporation ("the City"), owns and operates Lake Springfield. This lake is the source of water to residents of Springfield and others. The City acquired the land for the construction of the lake in the 1930's. It laid out part of the marginal shore lands adjacent to the lake into tracts of land and began leasing the tracts. The majority of leases were for single-family residences, but some were for private clubs and two were for commercial marinas. Approximately one-third of the leased tracts have been annexed into the City of Springfield. The remainder of the leased properties are not within the City of Springfield. The City also constructed a road system through its leased property. The nature and character of this road system is described in Andrews v. City of Springfield, 56 Ill. App. 2d 201, 205 N.E.2d 798 (4th Dist. 1965). One of the roads within this system is Westwood Lane.

On February 27, 1991, Petitioners, Rickey E. Weir and Janet E. Weir ("the Weirs") contracted to purchase a total of two and one-half acres of vacant land along Westwood Lane from the Wanless Estate. This transaction was actually two separate transactions in that two contracts were executed, one for the west one and one-half acres and one for the east one acre. The property that was the subject of the purchase contracts was not within the corporate limits of the City of Springfield and was never annexed. Westwood Lane separates these two and one-half acres from the City's lake lot lease development. This transaction closed, and the property was conveyed to the Weirs, on April 2, 1991. Since the Wanless Estate retained ownership of the vacant property to the east, the Weirs' property was landlocked, except for such access as might be provided by Westwood Lane. Shortly after this purchase, the Weirs requested a residential building permit from the County of Sangamon. On April 11, 1991, the county zoning authorities refused to issue a building permit on the grounds that the property lacked access from a pub-

lic road. A series of communications then occurred between the City and the Weirs concerning this problem. The basic position of the City was, and is, that Westwood Lane is its private property and for that reason the Weirs could be excluded therefrom. The City refused to grant the Weirs permission to use Westwood Lane to access their property unless the Weirs paid an annual monetary exaction to the City.

Finally, on October 15, 1991, the City Council passed an ordinance authorizing the City to enter into a 99-year license agreement with the Weirs. Because they believed they had no viable alternative at the time, and in order to use their property for its intended residential purposes, the Weirs decided that, out of necessity, they would have to enter into the license agreement. Under the license agreement, the Weirs were granted limited use of Westwood Lane for an annual fee of $500.00, compounded annually at the rate of four percent. The agreement allowed the Weirs to place a single driveway cut onto Westwood Lane from the west one and one-half acre tract only. The Weirs then built a $300,000.00 residence on the west one and one-half acres of their property. The City has similar license agreements with three other persons owning property outside the lake lot lease development.

The roads within the lake lot lease development are maintained by the City with revenues from its "Water Fund". A portion of the Water Fund consists of water bill proceeds. The Weirs purchase water and electricity from the City. Although the City has informed the Weirs that its practice has been, and is, to not allow property owners outside the lake lot lease development to use the lake lot roads to access adjoining property outside the development, this "practice" is not committed to writing in any formal policy, procedure or standard. The City's practice in this regard apparently originated with a deceased City employee named Pete Jones and has been perpetuated orally since that time. The City's comprehensive land use plan does not mention, treat or address the lake lot roads in any way. The City's objective in restricting access has been to discourage development of adjacent properties and to minimize density around the lake. However, the City has conducted no studies or surveys regarding the possible detrimental effect of allowing non-lessees to use the lake roads to access property adjoining the development. The City has interpreted the Illinois Appellate Court's decision in Andrews v. City of Springfield, 56 Ill. App. 2d 201, 205 N.E.2d 798 (4th Dist. 1965) to mean that the lake lot roads are "private lanes". These roads are not marked or designated "Private", "For Leaseholders Only", "Keep Off" or "No Trespassing". Members of the public are permitted to travel the lake lot roads to get to the various properties within the development. For example, delivery trucks, police cars, United States Postal service vehicles, contractors' trucks and passenger vehicles frequently travel these roads.

The City knows of no way in which the Weirs are using their prop-

erty in a harmful manner. According to the City, if the Weirs attempted to develop their vacant lot next to their $300,000.00 residence, that would constitute a use not permitted under the license agreement, and the license agreement would then be enforced or revoked by the City.

In 1996, the Weirs brought a declaratory judgment action against the City in the Sangamon County Circuit Court, alleging that the City could not lawfully restrict their right to freely use Westwood Lane for access to and from their property. The declaratory judgment complaint alleged, among other things, that the actions of the City with respect to the Weirs' property constituted an unlawful taking and a deprivation of due process, in violation of the United States Constitution. The Weirs ultimately requested, and were granted, summary judgment against the City. In its order granting summary judgment, the trial court found that Westwood Lane, as part of the City's municipal street system, was a public road and that the City could not legally deny the Weirs a right of free access. The City then appealed to the Illinois Appellate Court, Fourth District.

The Illinois Appellate Court reversed the trial court, largely on the grounds that a "municipal street" may be private or public and that under Andrews, supra, Westwood Lane is in fact a private road and that the City may charge the Weirs for using it to access their property. The Illinois Appellate Court did not address the Weirs' claim that the City's actions in denying the Weirs free access to their property, via Westwood Lane, constituted an unconstitutional taking and an unconstitutional substantial deprivation of access without due process of law.

The Weirs filed a timely Petition for Rehearing in the Illinois Appellate Court, which was denied. The Petition for Rehearing asserted, among other things, that the Illinois Appellate Court had overlooked the takings and due process claims. The Weirs timely petitioned the Illinois Supreme Court for leave to appeal. In their Petition for Leave to Appeal, the Weirs argued, among other things, that the City's actions constituted an unconstitutional taking of property without just compensation and an unconstitutional substantial deprivation of access without due process of law. That Petition for Leave to Appeal was denied on January 29, 2001.

REASONS FOR GRANTING THE PETITION

The Takings Clause of the Fifth Amendment to the United States Constitution provides that private property shall not be taken for public use, without just compensation. The Takings Clause is made binding on state and local governments by the Fourteenth Amendment to the United States Constitution. Penn Central Transportation Co. v. New York City, 438 U.S. 104, 122, 98 S.Ct. 2646 (1978).

Under the law of the State of Illinois, the Weirs possess a protected interest in access to their property. In Illinois, a city is deemed to hold its streets in trust for the people of the entire state, even if the city owns the street in fee, and every citizen of the state has an equal right to use such street for street purposes. Peoples Gas Light & Coke v. City of Chicago, 413 Ill. 457, 109 N.E.2d 777, 781 (1952). An Illinois property owner whose land abuts upon a public street or highway has, as an incident of ownership, the right of access, subject to reasonable regulation or restriction by the government. Ryan v. Rosenstone, 20 Ill. 2d 79, 169 N.E.2d 360, 362 (1960). Under Illinois law, "access" denotes the right vested in the owner of land adjoining a road or other highway to go and return from his own land to the highway without obstruction. Stoner Mfg. Co. v. Young Men's Christian Association of Aurora, 13 Ill. 2d 162, 148 N.E.2d 441, 445 (1958).

In the case at bar, the Weirs have no access to their property other than from Westwood Lane. The City will not allow the Weirs to have free access and has conditioned such access as has been granted upon the payment of an annual fee. In many respects, this case resembles a regulatory takings case, as the City claims that the objective of its decision to limit access rights with respect to its lake roads is to discourage development of adjacent properties and to minimize density around the lake. While the City's actions have not totally destroyed the value of the Weirs' property, the restricted access has most certainly significantly reduced the market value of the property. Although this Court has not yet reviewed a case involving a partial regulatory taking, at least one federal appeals court has. In Florida Rock Industries, Inc. v. United States, 18 F.3d 1560 (Fed. Cir. 1994), the Federal Circuit Court of Appeals expressly acknowledged that there can be a compensable regulatory taking even where the property in question still retains substantial value.

The determination of whether a taking has occurred is to be made on a case by case basis. Pennsylvania Coal v. Mahon, 260 U.S. 393, 413, 43 S. Ct. 158 (1922); Lucas v. South Carolina, 505 U.S. 1003, 112 S.Ct. 2886, 2893 (1992). In this particular case a taking has occurred. But for the license agreement between the City and the Weirs, the property in question would be virtually useless, since there would be no way to get to and from it in a vehicle. The

problems with the license agreement are many. First, there is the annual fee which must be paid thereunder. Second, a license is, by definition, revocable. Third, the license agreement covers only one of the parcels purchased by the Weirs. The smaller, one-acre parcel to the east is still without any access to a road whatsoever. By denying to landowners whose property borders the City's lake development the right to use the roads upon which their property abuts, the City is assuring that these adjoining landowners are unable to develop their property. The City is, in essence, "getting something for nothing". It is difficult to say that the City is acting to promote a legitimate state interest, since the "practice" of denying adjoining property owners the right to use the lake road system is not committed to writing in any formal policy, procedure or standard. Moreover, the City has conducted no studies or surveys regarding the possible detrimental effect of allowing non-lessees to use the lake roads to access property adjoining the development. Most importantly, in this particular case, the City admits it knows of no way in which the Weirs are using their property in a harmful manner. The Illinois Appellate Court and the Illinois Supreme Court have refused to review the Weirs' takings claims. The Illinois Appellate Court's Rule 23 order does not even refer to the takings claims.

The Weirs also claim that the City's actions have deprived them of a property interest without due process of law. In Simi Investment Company v. Harris County Texas, 236 F.3d 240 (5th Cir. 2000), a similar claim was made when the defendant county, by inventing and claiming ownership of a five-foot by 3000 foot county park, blocked the plaintiff landowner's lawful access to the street it abutted. Specifically, the landowner asserted that its right to substantive due process had been violated by the county. The Fifth Circuit Court of Appeals initially found that the county's blockage of access implicated a constitutionally protected state law property right. Simi Investment Company, 236 F.3d at 250. The Fifth Circuit then went on to apply the "rational basis test", ultimately holding that no rational basis existed to justify the county's interference with the plaintiff's property rights. In the instant case, the City would be hard-pressed to establish a rational basis for impeding access. As noted above, the "practice" of denying adjoining property owners the right to use the lake road system is not committed to writing in any formal policy, procedure or standard. The City has conducted no studies or surveys regarding the possible detrimental effect of allowing non-lessees to use the lake roads to access property adjoining the development. The City knows of no way in which the Weirs are using their property in a harmful manner. The Illinois Appellate Court and the Illinois Supreme Court also refused to review the Weirs' substantive due process claim. The Illinois Appellate Court's Rule 23 Order does not even refer to the substantive due process claim. Unless this Court grants the Weirs' petition, the Weirs, and all othe rproperty

owners like them, will never be afforded the opportunity ot have their constitutional claims reviewed and adjudicated. These claims are worthy of review by this Court.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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April 2001

APPENDIX A

NO. 4-99-0917
FILED IN THE APPELLATE COURT
OF ILLINOIS
FOURTH DISTRICT

RICKEY E. WEIR and JANET E. WEIR,
Plaintiffs-Appellees,
v.
THE CITY OF SPRINGFIELD, ILLINOIS,
a Municipal Corporation,
Defendant-Appellant.

Appeal from
Circuit Court of
Sangamon County
No. 96MR65

Honorable
Thomas R. Appleton,
Judge Presiding.
Entered: June 30, 2000

ORDER

In February 1996, plaintiffs, Rickey E. Weir and Janet E. Weir, sued for declaratory and injunctive relief from a license agreement with defendant, City of Springfield (City), granting plaintiffs vehicular use of Westwood Lane. Plaintiffs filed a motion for summary judgment, claiming that because Westwood Lane was a public road, the City could not require them to pay for access to it. The trial court agreed and entered summary judgment for plaintiffs.

The City appeals, arguing that the trial court erred by granting summary judgment because Westwood Lane is a private road owned and maintained by the City to provide leaseholders access to residential property along Lake Springfield. We reverse and remand for further proceedings.

I. BACKGROUND

In the 1930s, the City bought a large tract of land in Sangamon County on which the City built a lake (Lake Springfield) to supply water to Springfield citizens. After completing the lake, the City divided a portion of the surrounding shorelands into unplatted lots and began leasing the lots for terms of 6.0 years. Most leases allowed only single-family residences; however, the City also granted leases to private clubs and two commercial marinas. To service these properties, the City built a system of roads, which it is responsible for maintaining and repairing. Westwood Lane is one of those roads.

Westwood Lane borders the City's lake property and serves as its boundary. Around February 1991, plaintiffs contracted to purchase two plots of land along Westwood Lane totaling 2 1/2 acres. The property fell outside the corporate city limits and was landlocked except for access via Westwood Lane. An addendum to the contract stated that it was contingent upon plaintiffs' being able to use Westwood Lane to gain access to the property.

The plaintiffs later obtained the property by warranty deed and sought permission from Sangamon County zoning officials to build a residence on it. The zoning officials denied plaintiffs' request, stating that Westwood Lane was a private road owned by the City; thus, plaintiffs could not legally gain access to their property by vehicle.

Plaintiffs then sought permission from the City to use the road, and the City agreed. The city council passed an ordinance (Springfield Ordinance No. 841-09-91 (eff. October 15, 1991)) authorizing the City to execute a license allowing plaintiffs vehicular access to their property via Westwood Lane. The parties executed the license agreement, giving plaintiffs the right to place a single connecting driveway on the property in exchange for paying an annual fee of $500 with a 4% annual increase. (The City had previously granted similar licenses to individuals whose property abutted City-owned lake roads.) Thereafter, Sangamon County zoning officials gave plaintiffs permission to build a single-family residence on their property, and in 1992, plaintiffs finished construction of their residence.

In February 1996, plaintiffs sued for injunctive and declaratory relief from the license agreement, claiming that Westwood Lane was a public road, and as such, the City had no right to charge for its use. In response, the City filed affidavits from several City and Sangamon County officials, who unanimously concluded that Westwood Lane was a private road owned by the City and maintained by a City department--namely, City Water, Light, and Power. The trial court granted plaintiffs' summary judgment motion, and this appeal followed.

II. ANALYSIS

The City argues that the trial court erred as a matter of law when it declared Westwood Lane a public road and entered summary judgment for plaintiffs. Specifically, the City contends that the trial court's reliance on Andrews v. City of Springfield, 56 Ill. App. 2d 201, 205 N.E.2d 798 (1965), was misplaced because Andrews does not support the conclusion that Westwood Lane is a public road but, rather, supports the opposite conclusion, that Westwood Lane is a private road.

A motion for summary judgment is proper only when (1) no genuine issue of material fact exists and (2) the moving party is entitled to a judgment as a matter of law. 735 ILCS 5/21005(c) (West 1998). We will reverse a summary judgment order if a genuine issue of material fact exists or if the judgment is incorrect as a matter of law; the trial court's decisions regarding summary judgment are not discretionary and are reviewed de novo. Masinelli v. McDonald, 251 I11. App. 3d 398, 400, 622 N.E.2d 854, 856-57 (1993).

A. Statutory Considerations The Illinois Municipal Code (Municipal Code) (65 ILCS 5/11-126-1 (West 1998)) authorizes cities such as Springfield to provide water to city residents by either constructing a system of waterworks or obtaining water from adjacent municipalities already possessing waterworks systems. For such purposes: "[E]ach municipality may go beyond its corporate limits, and acquire and hold property purchased or otherwise, and also may take, condemn, and hold all necessary property in the manner provided for the taking or damaging of private property for public use. Also[,] each municipality may acquire and hold property and rights necessary for the location, construction[,] and maintenance of such a system of waterworks, by purchase or otherwise." 65 ILCS 5/11-126-3 (West 1998).

Furthermore, municipalities are authorized to regulate and manage city-owned lands surrounding a system of waterworks, which may include leasing such lands to private persons or entities. To this end, section 11-126-4 of the Municipal Code provides: "If the leasing of portions of such adjacent zone of land will, in the discretion of the corporate authorities, aid in the protection from pollution or other injury of the impounding reservoir or artificial lake by promoting forestation, development[,] or care of other suitable vegetation, and the improvement, care[,] and maintenance of the premises, the corporate authorities may lease those portions of that land jointly or severally to custodians of good reputation and character for periods not to exceed 60 years, and permit those custodians to construct, maintain, use, and occupy dwelling houses and other structures thereon for such rental and on such other terms and conditions and subject to such rules and regulations and with such powers and duties as may be determined by the corporate authorities." 65 ILCS 5/11126-4 (West 1998). The City's authority to perform such acts originates in the power to incorporate, and under that corporate name to sue and be sued, enter into contracts, and acquire and hold real and personal property for corporate purposes. 65 ILCS 5/2-2-12 (West 1998). Implicit in this statutory authority is the right of the City to build roads to access the leased property and to maintain and repair such roads as the owner and landlord of the leased premises. See generally Andrews, 56 I11. App. 2d at 213-14, 205 N.E.2d at 804-05.

Plaintiffs do not contest the City's authority to buy and lease property or to create roads to such property. Instead, they assert that roads created pursuant to such authority are public roads. Specifically, plaintiffs contend that Westwood Lane was created under this authority, and as such is a public road.

Public highways can be established in one of three ways: by prescription, by dedication, or by statute. Koch v. Mraz, 334 Ill. 67, 75, 165 N.E. 343, 346 (1929). Plaintiffs claim that Westwood Lane has become a public road through prescription. In support of their claim, plaintiffs point out that persons other than lake lot lessees have used the road for several years and that no signs are posted designating the road as private.

Even accepting plaintiff's factual assertions as true, they do not establish the existence of a public way by prescription. To become a public way by prescription, the public's use of a road must be (1) adverse, (2) open and notorious, (3) under a claim of right, (4) continuous and uninterrupted, and (5) with the knowledge of the owner but without his -consent, for a period of 15 years. Town of Deer Creek Road District v. Hancock, 198 I11. App. 3d 567, 570, 555 N.E.2d 1147, 1148-49 (1990). The test for whether a road has become a public highway by prescription does not turn on the number of persons who use the road, but on the character of the use; that is, whether the public had a free and unrestricted right to use the road. Koch, 334 Ill. at 75, 165 N.E. at 346.

B. The Impact of Andrews

Plaintiffs next argue that this court's holding in Andrews dictates that lake roads such as Westwood Lane are public pursuant to the municipal street system provision of the Illinois Highway Code (Highway Code) (605 ILCS 5/2-104 (West 1998)). Specifically, plaintiffs contend that this court in Andrews concluded that the lake roads at issue in that case were "municipal streets" under section 2-104 of the Highway Code, and that because Westwood Lane is part of the lake road system, it is a "municipal street." Further, according to plaintiffs, because all "municipal streets" are by definition open to public use, Westwood Lane as a "municipal street" is open to public use. Assuming arguendo that we agree with plaintiffs' characterization of our holding in Andrews, we disagree with plaintiff's contention that all "municipal streets" are public roads. Sections 2-104 and 2-202 of the Highway Code show that the legislature contemplated that "municipal streets" could be either public or private. Section .2-104 reads, in pertinent part, as follows:

> "The municipal street system of the several municipalities includes existing streets and streets hereafter established in

municipalities which are not a part of the State highway system or county highway system, together with roads outside their corporate limits over which then have jurisdiction pursuant to the Code or any other statute ***." (Emphasis added.) 605 ILCS 5/2-104 (West 1998).

On its face, section 2-104 encompasses Westwood Lane, which the City constructed pursuant to its statutory authority to buy and lease lands for the purposes of developing a water supply system. 65 ILCS 5/11-126-4 (West 1998). However, section 2-104 cannot be read to the exclusion of section 2-202, which defines a highway as follows:

"any public way for vehicular travel which has been laid out in pursuance of any law of this State, or of the Territory of Illinois, or which has been established by dedication, or used by the public as a highway for 15 years, or which has been or may be laid out and connect a subdivision or platted land with a public highway and which has been dedicated for the use of the owners of the land included in the subdivision or platted, land where there has been an acceptance and use under such dedication by such owners, and which has not been vacated in pursuance of law. *** A highway in a rural area may be called a 'road,' while a highway in a municipal area may be called a 'street.'" (Emphasis added.) 605 ILCS 5/2-202 (West 1998).

The last sentence of section 2-202 of the Highway Code clearly recognizes that a "municipal street" is a type of "highway." "Highways" may be private or public. If all highways were by definition public, then the provision of section 2-202 allowing roads to become public by prescription would be meaningless. Accordingly, plaintiffs' claim that "municipal streets" are necessarily public is without merit.

We further disagree with plaintiffs' contention that in Andrews we declared the lake roads at issue public.

In Andrews, a group of lessees along the marginal shoreline area of Lake Springfield brought a declaratory judgment action against the City seeking to force the City to maintain the roads it built and had previously maintained. After the City stopped maintaining the roads, the lessees brought suit. The City asserted that it was not responsible for maintaining the roads because they were "township roads." 605 ILCS 5/2-205 (West 1998). We held that the roads were not "township roads" and that the City was responsible for maintaining them. In so holding, we affirmed the trial court's ruling and noted that the trial court found the roads to be private.

Nowhere in Andrews do we hold that the roads are "public roads" or "municipal streets," as plaintiffs contend. Rather, our decision that the City was required to maintain the roads was based on the fact that the City

owned the land on which the lessees resided and on which the roads were located. Essentially, the City was a landlord, and the individual lease agree ments controlled the question of who should maintain the roads. We concluded that the leases did not require the lessees to maintain the roads. We further noted that the City, as landlord, could have included such a provision but did not. These factors led us to conclude that the City should maintain the roads, not that the roads were "public roads" or "municipal streets."

> Plaintiffs rely on the following passage from Andrews:
> "We do not believe that section 2-104 *** requires that roads, to be a part of the Municipal Street System, must bear any relationship to the streets in the corporate limits, or that they must join or intersect streets within the city limits ***.
>
> We conclude that the roads, over which the City maintained sole jurisdiction since their construction to February 1961, are not part of the Township and Road District System under section 2-103 of the Illinois Highway Code." (Emphasis added.) Andrews, 56 I11. App. 2d at 210-11, 205 N.E.2d at 803.

Plaintiffs assume that since we declared the roads not part of the township and road district system, we necessarily concluded that the roads were part of the "municipal street system" and therefore public. Plaintiffs accordingly argue that any road that is part of the "municipal street system" must automatically be a public street. We do not read Andrews to mean that roads within the "lake road system" are public roads and do not agree that Andrews confirms plaintiffs' position that Westwood Lane is a public road.

This court's more recent decision in City of Mattoon v. Paradise Township, 131 Ill. App. 3d 327, 475 N.E.2d 644 (1985), was decided under virtually identical factual circumstances. The issue, similar to Andrews, was who should be responsible for repairing particular lake roads, the city or the township. Going a step farther than we did in Andrews, we held that Lake Paradise Road, at issue there, was part of the "municipal street system" and the city was responsible for repairs. City of Mattoon, 131 Ill. App. 3d at 332, 475 N.E.2d at 648. However, in doing so, we reversed the trial court's determination that the road was a public road and rejected its conclusion that the road had become public by prescription. Our conclusion there contradicts plaintiffs' argument here, that if Westwood Lane is part of the "municipal street system," it must be a public street.

Furthermore, the methodology used to address the questions presented in both Andrews and Mattoon supports the conclusion that Westwood Lane, and "municipal streets" in general, are not automatically public. In both cases, we addressed whether the city was responsible for maintaining the lake roads in question by discussing whether they were

part of the "township road system" or the "municipal street system." Holding that they were part of the municipal system in Mattoon and implying the same in Andrews, we nevertheless addressed whether the respective roads had become public roads by prescription. If the definition of a "municipal street" necessarily means that such streets are also public streets, as plaintiffs contend, then addressing whether the roads in Andrews and Mattoon had become public by prescription would have been meaningless.

Property owners have a right to gain access to public streets adjoining their property that cannot be taken away without just compensation. R.G. Lydy, Inc. v. City of Chicago, 356 Ill. 230, 240, 190 N.E. 273, 277 (1934)., In Andrews and Mattoon, this court addressed whether the roads had become public by prescription precisely because they had not become public by virtue of being municipal. Finally, this method of analysis gives effect to the plain language of sections 2-104 and 2-202 of the Highway Code, which neither expressly state nor imply that a street must be open to the public merely because it is built on land that a municipality owns. 605 ILCS 5/2-104, 2-202 (West 1998) .

III. CONCLUSION

For the reasons stated, we reverse the trial court's grant of summary judgment for plaintiffs and remand for further proceedings consistent with the views expressed herein.

Reversed and remanded.

STEIGMANN, J., with McCULLOUGH and KNECHT, JJ., concurring.

APPENDIX B

IN THE CIRCUIT COURT OF THE SEVENTH JUDICIAL CIRCUIT
SANGAMON COUNTY, ILLINOIS

RICKEY E. WEIR and
JANET E. WEIR,

Plaintiffs

VS.

CASE NO. 96-MR-65
Entered: October 22, 1999

THE CITY OF SPRINGFIELD,

ILLINOIS, a municipal corporation,

Defendant

ORDER

This cause comes on for consideration on the Plaintiff's Motion for Summary Judgment. The Court has reviewed the affidavits and discovery material submitted and has considered the arguments of the parties.

The facts in brief are these: Plaintiffs purchased property abutting Westwood Lane. On the opposite side of that roadway are improved lots which are leased from the City of Springfield as lake lots created by the City's construction of Lake Springfield. Westwood Lane was constructed by the City to serve the lake lots sold by it, in effect establishing a part of the boundary of the lake property. Westwood Lane is not denominated by ordinance or signage as a private road. By operation of Andrews v. City of Springfield (1965) 56 Ill App 2d 201 it is a part of Springfield's Municipal street system.

Plaintiffs were initially denied a building permit by Sangamon County as they did not have access to a roadway from their property. That decision caused them to seek access to Westwood Lane from the City of Springfield, and the City sold Plaintiffs a license to access the road from their property for $500 each year for 99 years. Plaintiffs now seek a declaratory judgment to the effect that this license agreement is void on the basis that Westwood Lane is open to the public and therefore not subject to a user fee such as the license sold to Plaintiffs.

If Westwood Lane was a private road, the owner of the road, here the City, could limit access to it. Westwood Lane is a public street (Andrews) and as a consequence the rules change. The City is empowered to regulate the use of the street but is not empowered to deny access to it. 73 ALR 2d 652. In Pure Oil Co. v. City of Northlake the municipality required, specifications for drive-

ways crossing sidewalks. While the limited power to regulate driveways for public safety was acknowledged, the burden was on the city to show how the ordinance was necessary. Relying on Lydy Inc. v. City of Chicago 356 Ill. 230, the Court quoted from Lydy:

> "The right of a property owner to access to the public streets adjoining his property is a valuable property right, which can not be taken away without just compensation..."

and found that the city's right of regulation extended only to restrictions:

> "in some reasonable manner consistent with the public good. The instant ordinance not only fails to spell out any reasonable standards which a property owner must meet as a condition precedent to acquiring a driveway permit, it purports to authorize the outright denial of a permit in any situation, depending on the will of the city council" 10 Ill 2d at 245-6.

Here, there is no ordinance establishing the city's regulation of the road, simply an apparently ad hoc policy of City Water Light and Power.

In argument the City urges that it has a need to keep development away from lake property so as to protect the lake itself from pollution. This is the proffered reason for denying driveway cuts into such roads absent special arrangements such as the license here. In Harris Bank v. Village of Mettawa (1993) 243 Ill App 3d 103 the village sought, in effect, to zone property not within the village limits by conditioning approval of curb cuts for access to a village road abutting Plaintiff's unincorporated property based on intended use. The Court found that the ordinance restricting access to the road deprived the abutting owner of due process of law.

Summary declaratory judgment is awarded to Plaintiffs to the effect that Defendants are without authority to deny them access to Westwood Lane. While the city is legally capable of instituting regulations designed to protect the public good as to the road, it cannot do so in abrogation of Plaintiff's property rights.

The Clerk is directed to send a copy of this order to Ms. Thomas and Mr. Vigneri.

ENTER: October 19, 1999

S. Thomas Appleton
CIRCUIT JUDGE

APPENDIX C

90506

SUPREME COURT OF ILLINOIS
CLERK OF THE COURT
SUPREME COURT BUILDING
SPRINGFIELD, ILLINOIS 62701
(217) 782-2035

January 29, 2001

Mr. Joseph W. Vigneri
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No. 90506 - Rickey E. Weir et al., petitioners, v. The City of Springfield, etc., respondent. Leave to appeal, Appellate Court, Fourth District.

The Supreme Court today DENIED the petition for leave to appeal in the above entitled cause.

APPENDIX D

STATE OF ILLINOIS
APPELLATE COURT
FOURTH DISTRICT
SUPREME COURT BUILDING
SPRINGFIELD 62701-1792

DATE: 10/04/2000

RE: Weir, Rickey & Janet v. City of Springfield
General No.: 4-99-0917
Sangamon 96MR65

TO COUNSEL:

The court today denied the petition for rehearing filed in the above entitled cause.

The mandate of this court will issue in 21 days to the Clerk of the Circuit Court unless an affidavit of intent to seek review in the Illinois Supreme Court (Rule 368) is filed in this court.

DARRYL PRATSCHER, CLERK
Appellate Court
Fourth District

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